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No. 73-855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

HERMAN EDWARDS, ET AL.,
Petitioners,

vs.

THE CITY OF COLUMBUS, OHIO,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES J. HUGHES, JR.,
City Attorney,

ROBERT A. BELL,
First Assistant City Attorney,

EARL J. SILBERMAN,
Senior Assistant City Attorney,

DONNA BOWMAN,
Assistant City Attorney,

90 West Broad Street
Columbus, Ohio 43215
Attorneys for Respondent.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

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No. 73-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

HERMAN EDWARDS, ET AL.,*
Petitioners,

vs.

THE CITY OF COLUMBUS, OHIO,
Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent prays that a Writ of Certiorari to review the judgments of the Supreme Court of Ohio, the Court of Appeals, Fifth Appellate District, Delaware County, Ohio, and the Common Pleas Court of Delaware County, Ohio, be denied because there were no Federal Constitutional questions concerning the due process clause or the equal protection clause of the Fourteenth Amendment decided by the state courts or raised therein nor was there any reliable, probative or substantial evidence admitted concerning those questions. The judgment of the state courts represents the correct application of the state law.

* H. J. and Ruth J. Edwards, Orlo C. and Frances V. Trapp, and A. P. and Josephine Lastoria.

OPINIONS BELOW

The Ohio Supreme Court dismissed the appeal and denied a motion for rehearing on the ground no substantial constitutional question exists (Appendices C & D, pages 14 and 15, Petition). The Court of Appeals, Fifth District, Delaware County, rendered a written decision and judgment (Appendix A, pages 6 through 13, Petition). The Common Pleas Court made findings of facts and conclusions of law as printed in full as Appendix A, page 12 and a judgment entry, Appendix B, page 15.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

Whether the United States Supreme Court will grant a Writ of Certiorari relating to the issues of deprivation of private property without due process of law and a denial of equal protection under the Fourteenth Amendment, U. S. Constitution, where neither issue was raised in the state trial court nor specifically raised in the state court of appeals and where the state supreme court found that no substantial constitutional question existed.

Whether a municipal corporation, owner of a public reservoir including all riparian rights thereto, acting pursuant to law for public necessities, purposes and uses, abridges the due process clause or the equal protection clause of the Fourteenth Amendment to the U. S. Constitution as to abutting private property owners where it:

1. Institutes negotiations and actions in eminent domain against abutting owners;
2. Selects riparian areas of property it owns or controls around the reservoir upon which to do certain lawful acts or to omit doing them;

3. Refuses to construct protective works not only upon property it owns or controls but upon private property, as demanded by petitioners, which private property has suffered no damage.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment to the United States Constitution:

> "Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws:

Ohio Constitution, Section 19 of Article I:

> § 19 [Inviolability of private property.]
> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Ohio Constitution, Section 4 of Article XVIII:

> § 4 [Acquisition of public utility; contract for service; condemnation.]
> Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or

> its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Ohio Revised Code, Title 7, Sections 719.01, 719.02 and 743.01, are printed in full in Appendices C, D, and E, respectively, *infra*, pp. 17, 21 and 22.

STATEMENT OF THE CASE

Respondent owns, operates and maintains Hoover Reservoir, as a water supply system and public recreational area, for use by the public generally. It lies partly in Franklin County and partly in Delaware County.

In 1965 Respondent determined a critical water shortage would shortly occur based on the then present supply. Respondent's City Council appropriated $100,000 and authorized engineering studies to be made of the reservoir for the public purposes of increasing the water supply, erosion and flood control, maintenance of the public character of the reservoir and surrounding shoreline, and protection of the public investment.

The engineering studies resulted in several solutions adopted by Respondent which included:

1. The erection of eight foot flood gates at the dam to increase the water supply and aid in controlling downstream erosion and flooding.
2. The appropriation of additional shoreline to maintain the public character and public use of the reservoir at all shoreline points and to control erosion of private property.

3. The protection of certain shoreline areas by providing protective covering (rip rap) on **Respondent's** property where it was necessary and feasible based upon sound engineering practices and where private dwellings might suffer erosion damage within the next ten to twenty years.

The level of water in the reservoir is 890 feet above sea level. The erection of the flood gates, completed in 1970, could raise the level to 898 feet which level would still **not** innundate Petitioners' properties.

The entire shoreline is owned by Respondent in fee to varying depths from the water's edge. The additional appropriations are to include parts of Petitioners' properties and an option was given to all property owners, subject to actions in eminent domain, that the Respondent would agree to accept public use and flood easements in lieu of appropriating a fee simple if the negotiations could be satisfactorily settled out of court.

The engineering studies also showed it would not be feasible to provide protective coverings for the entire shoreline both from sound engineering practices and from the cost factor. Not only would the protective covering be useless and ineffective on some areas due to the slope of the banks and condition of the soil, but it would also interfere with shoreline public recreational activities. Further, to rip rap the entire shoreline would be economically prohibitive.

Petitioners own no property abutting the water's edge.

Petitioners were seeking to enjoin Respondent from proceeding in eminent domain and to require Respondent to construct protective works on both Respondent's and Petitioners' property.

There were **no** protective works provided on any of the shoreline when the reservoir was completed.

There are presently no protective works on any private property except where Respondent has decided it is necessary and has a direct and perpetual easement for public use and purposes which effectively eliminates its exclusively private use.

Respondent has proceeded in all instances pursuant to law to acquire additional property for public purposes and necessities.

ARGUMENT

I

Federal Constitutional Questions Must Be Raised And Ruled Upon In State Courts.

The due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution were not raised in the state court until appeal to the Ohio Supreme Court. The United States Supreme Court will not decide whether constitutional rights have been violated when federal questions are not raised in accordance with the requirements of state law. *Chicago, Indianapolis and Louisville Ry. v. McGuire,* 196 U.S. 128, 49 L.Ed. 413, 25 S.Ct. 200; *Hulbert v. Chicago,* 202 U.S. 275, 50 L.Ed. 1026, 26 S.Ct. 617; *Edelman v. California,* 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293.

It is a rule in Ohio that a constitutional question in a civil or criminal case cannot be raised in the Supreme Court unless it was first presented in the lower courts. *State, ex rel., King v. Shannon,* 170 Ohio St. 393; *Hoffman v. Stanley,* 92 Ohio St. 505; *Cuthbertson v. State,* 106 Ohio St. 658; *Zimmerman v. Morris Plan Bank of Cleveland,* 113 Ohio St. 703; *Village of Clarington v. Althar,* 122 Ohio St. 608.

The decisions of the Common Pleas Court and Court of Appeals for Delaware County were based solely on

state law. The decision by the Ohio Supreme Court dismissing the appeal does not indicate whether the federal issue raised was even considered. The dismissal rests on adequate state law. The United States Supreme Court will not review judgments of state courts that rest on adequate state grounds. *Hammerstein v. Superior Court of the State of California*, 340 U.S. 622, 95 L.Ed. 586, 71 S.Ct. 521; *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429.

The United States Supreme Court is bound by a state court's decision interpreting state statutes. *Carstairs v. Cochran*, 193 U.S. 10, 48 L.Ed. 596, 24 S.Ct. 318; *Quang Ham Wah Co. v. Industrial Accident Comm.*, 225 U.S. 445, 65 L.Ed. 723, 41 S.Ct. 373; *Spieser v. Randall*, 357 U.S. 513, 2 L.Ed. 2d 1460, 78 S.Ct. 1332; *Garner v. Louisiana*, 368 U.S. 157, 7 L.Ed. 2d 207, 82 S.Ct. 248.

Cox, et al., v. Texas, 202 U.S. 446, 50 L.Ed. 1099, 26 S.Ct. 671 (1906) states in the fourth paragraph of the syllabus:

> "A federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter court on a writ of error to the state court, where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground it was not raised in the trial court."

II

The State Courts' Findings Were Based On Adequate State Law.

The trial court was confronted with deciding whether Respondent complied with state law as to proceedings in eminent domain and whether Respondent abused its discretion, committed fraud or acted arbitrarily in doing acts described in the statement of the case and whether

Respondent had a legal duty to do positive acts demanded by Petitioner to control **threatened** but not **actual** erosion upon Petitioners' property.

The court made these determinations in Findings of Facts No. 6 through 8 and Conclusions of Law 1 through 4, Appendix A, page 13.

The Court of Appeals is limited to deciding appeals on questions of law only. The question was whether the evidence supported the Findings of Facts and Conclusions of Law and Judgment and, if not, whether the trial court abused its discretion in rendering judgment for Respondent. Petitioners' six assignments of error were overruled in their entirety. Appendix A, pages 7 and 11, Petition. The appellate court found the evidence supported the Findings of Fact and the Conclusions of Law, that there was no abuse of discretion on the whole record and that Petitioners failed to sustain their burden of proof by clear and convincing evidence. Appendix A, pages 7 and 11, Petition.

III

Petitioners' Citations Are Not Related To The Case.

Bank of Toledo v. Toledo, 1 Ohio St. 633 (1853) determined matters concerning the effect of corporate charters and franchises, surrendering legislative taxing power, inviolability of contracts, *inter alia.*

Cincinnati v. Louisville and Nashville R.R., 223 U.S. 390, 56 L.Ed. 481, 32 Sup. Ct. 267 (1912) discussed whether an ordinance of 1787, Northwest Territory, and the constitutional inhibition against impairment of contracts limited the exercise of the power of eminent domain.

In *Hessel v. A. Smith & Co.*, 15 F.Supp. 953 (1936) plaintiff sought an injunction against Smith Co., contractor with the United States to build a post office on plaintiff's property because the condemnation proceedings by the United States were not finalized. The court denied injunctive relief saying it was unnecessary to have the condemnation suit fully adjudicated.

In *Sargent v. Cincinnati*, 25 N.P. (N.S.) 89, *aff'd* 110 Ohio St. 444 (1924) the court found the city was a perpetual leaseholder of plaintiff and could not proceed in eminent domain against him as this would be an impairment of a contractual obligation by legislative or judicial proceedings contrary to constitutional provisions.

None of the facts or decisions of the foregoing cases had any relevance to due process or equal protection clauses of the Fourteenth Amendment, U. S. Constitution, as those clauses relate to the facts herein.

The secondary authorities of *19 Ohio Jurisprudence 2d*, §7, "Eminent Domain," at page 414, as well as Nicholas, *Eminent Domain* (3d ed. 1970) §7.31, merely state the Fourteenth Amendment limits the power of eminent domain but no relationship is shown to the findings and judgments of the state courts.

See *16 American Jurisprudence 2d*, "Constitutional Law, §495, "Legislative Discretion and Power," pages 862 and 863.

IV

Petitioners Have Not Been Deprived Of Property Without Due Process Nor Have They Been Denied Equal Protection.

The exercise of the power of eminent domain is the exercise of a police power. Paragraph five of the syllabus

of *Benjamin v. Columbus*, 167 Ohio St. 103, 4 Ohio Ops. 2d 113, 146 N.E. 2d 854, *cert. denied* 357 U.S. 904, 2 L.Ed. 2d 1155, 78 Sup.Ct. 1147, states:

> "5. Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary."

Equal protection could not be an issue for the reason that even though some abutting property owners might receive an incidental beneficial result from the construction of protective works, the construction is upon land owned or controlled by Respondent and Petitioners have not shown they are in a class that was denied equal protection. Yet if equal protection is an issue, each owner is not in the same class because each owns a **unique** parcel which abuts a **unique** area of shoreline. In adopting a classification the legislature has wide discretion. *Wessell v. Timberlake*, 95 Ohio St. 21, at 39 and 40; *State v. Norval Hotel Co.*, 103 Ohio St. 361, at 366 and 367. Petitioners have not established themselves into any class other than the insufficient requirement of being an abutting owner.

CONCLUSION

For the foregoing reasons the Petition should be denied.

EARL J. SILBERMAN
Senior Assistant City Attorney

DONNA BOWMAN
Assistant City Attorney

90 West Broad Street
Columbus, Ohio 43215

Attorneys for Respondent.

APPENDIX A

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

FINDINGS OF FACT AND CONCLUSIONS OF LAW

No. 20.992

CHARLES NICKLAUS, ET AL.,
Plaintiffs,

vs.

CITY OF COLUMBUS, OHIO,
Defendant.

No. 21.069

HELEN M. RIPPEL, ET AL.,
Plaintiffs,

vs.

CITY OF COLUMBUS, OHIO,
Defendant.

FINDINGS OF FACTS

1. Plaintiffs own real estate adjacent to land owned by Defendant which land abuts the shoreline of Hoover Reservoir also owned by Defendant which is a public utility serving a public purpose.

2. Hoover Dam and the abutting shoreline is owned by Defendant in fee simple and is part of a public utility used to supply water to the citizens of Defendant City.

3. Defendant has made studies and instituted a project, namely erecting eight foot flood gates, for the public purpose of increasing its water supply, as it will shortly

become critical, and for the public purpose of controlling downstream flooding.

4. Engineering studies were made which projected, among other things, erosion on the shoreline.

5. Defendant has concluded from these studies that along some of the shoreline, where economically feasible, protective works should be erected and on other parts of the shoreline the land should be allowed to erode.

6. Defendant, in accordance with its plans, is proceeding according to law through its legislative arm and by legislative determination, to effect acquisition of additional property, to increase its water supply, to control downstream flooding, to protect the public peace, health, safety, welfare and property, the public utility and to paying just compensation to all whose property is acquired for this public purpose.

7. From the evidence presented the City Council of Defendant has lawfully determined to proceed with this public utility project and cannot be required to provide all plaintiffs lands with protective works or be required to put protective works on its own property.

8. Defendant, through its agencies and City Council, has and is proceeding in a lawful manner to acquire additional property to its present shoreline by paying or proposing to pay just compensation and putting the additional property to a public use.

The Court finds the following conclusions of law:

CONCLUSIONS OF LAW

1. Defendant, pursuant to Section 4, Article XVIII and Section 19, Article I of the Ohio Constitution, may acquire, own, lease and operate a public utility and may

acquire property for this purpose and Hoover Reservoir, the surrounding land all of which is owned by Defendant and the additional property to be acquired by Defendant, is for a public purpose for which just compensation has been paid or proceedings to pay it just compensation have been effected according to law.

2. Defendant has not abused its discretion, committed fraud or acted arbitrarily in the erection of flood gates or in the present stage of proceedings for increasing its water supply, controlling downstream flooding, controlling erosion to its property or others and in eminent domain proceedings.

3. Defendant is presently using its property in a lawful manner and contemplates the lawful use of property to be acquired from Plaintiffs according to law and the Court will not, therefore, interfere with the present use of presently owned property or the intended use of property to be acquired by Defendant.

4. Under the facts presented and applying the laws and Constitution of the State of Ohio, the Court finds, as a matter of law, the Plaintiffs are not entitled to the relief prayed for, either injunctive relief or by the way of mandamus.

S/GALE B. WELLER, *Judge*
Sitting by Assignment

APPENDIX B

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

No. 20,982

CHARLES NICKLAUS, ET AL.,
Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO,
Defendant.

No. 21,069

HELEN M. RIPPEL, ET AL.,
Plaintiffs,

vs.

THE CITY OF COLUMBUS, OHIO,
Defendant.

JUDGMENT ENTRY

These causes having been consolidated for purposes of trial, came on to be heard on the pleadings, evidence, briefs and arguments of counsel and the Court being fully advised in the premises finds that neither injunctive relief nor mandamus are available to plaintiffs under the facts of these cases and further finds the issues herein in favor of the defendant, City of Columbus, with respect to all causes of action.

It is, therefore, ordered, adjudged and decreed that the within causes be and the same are hereby dismissed.

Costs to plaintiffs.

Exceptions to plaintiffs.

S/GALE B. WELLER, *Judge*

APPROVED:

S/LEDA C. HARTWELL
S/HUGH E. KIRKWOOD, JR.
Attorneys for Plaintiffs

S/JOHN C. YOUNG, *City Attorney*
S/WILLIAM J. MELVIN, *Chief Trial Atty.*
S/EARL J. SILBERMAN, *Sr. Asst.*

APPENDIX C

Ohio Revised Code, Title 7:

§ 719.01 Appropriation of property by municipal corporations.

Any municipal corporation may appropriate, enter upon, and hold real estate within its corporate limits:

(A) For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose, the municipal corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use of such property, and for obtaining material for the improvement of streets and other public places;

(B) For parks, park entrances, boulevards, market places, and children's playgrounds;

(C) For public halls and offices, and for all buildings and structures required for the use of any municipal department;

(D) For prisons, workhouses, houses of refuge and correction, and farm schools;

(E) For hospitals, pesthouses, reformatories, crematories, and cemeteries;

(F) For levees, wharves, and landings;

(G) For bridges, aqueducts, viaducts, and approaches thereto;

(H) For libraries, university sites, and grounds therefor;

(I) For constructing, opening, excavating, improving, or extending any canal or watercourse, located in whole or in part within the limits of the municipal corporation or adjacent and contiguous thereto, and which is not owned in whole or in

part by the state, or by a company or individual authorized by law to make such improvements;

(J) For sewers, drains, ditches, public urinals, bathhouses, water closets, and sewage and garbage disposal plants and farms;

(K) For natural and artificial gas, electric lighting, heating, and power plants, and for supplying the product thereof;

(L) For establishing esplanades, boulevards, parkways, park grounds, and public reservations in, around, and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air, and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto;

(M) For providing a water supply for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites, and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without its limits; and for such purpose and [any] such municipal corporation may appropriate, in the manner provided in sections 163.01 to 163.22, inclusive, of the Revised Code, any property or right or interest therein, previously acquired by any private corporation for any purpose by appropriation proceedings or otherwise, and either party to such appropriation proceedings shall have the same right to change of venue as is given in the trial of civil actions;

(N) For the construction or operation of street, interurban, suburban, or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, ma-

chine shops, bridges, and other appurtenances for the transportation of persons, packages, express matter, freight, and other matter, in, from, into, or through the municipal corporation; and for such purpose any municipal corporation may appropriate any property within or without its corporate limits; and any municipal corporation may appropriate any property, right, or interest therein previously acquired by any private or public utility corporation for any purpose by appropriate proceedings, as well as the right to cross on, over, or under any street, avenue, alley, way, or public place or part thereof of any other municipal corporation, township, or county;

(O) For establishing airports, landing fields, or other air navigation facilities, either within or without the limits of a municipal corporation for aircraft and transportation terminals, with power to impose restrictions on any part thereof and leasing such part thereof as is desired for purposes associated with or incident to such airports, landing fields, or other air navigation facilities and transportation terminals, including the right to appropriate a right of way for highways, electric, steam, and interurban railroads leading from such airport or landing field to the main highways or the main line of such steam, electric, or interurban railroads, as are desired; all of which are hereby declared to be public purposes.

Division (O) of this section does not authorize a municipal corporation to take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such utility or carrier, unless provision is made for the restoration, relocation, or duplication of such property or facilities elsewhere, at the sole cost of the municipal corporation.

The powers conferred upon municipal corporations by this section shall be exercised for the purposes and in the manner provided in sections 163.01

to 163.22, inclusive, of the Revised Code.

"Airport," "landing field," and "air navigation facility," as defined in section 4561.01 of the Revised Code, apply to division (O) of this section.

APPENDIX D

Ohio Revised Code, Title 7:

§ 719.02 Appropriation of property outside municipal corporation; payment in lieu of taxes.

In the appropriation of property for any of the purposes named in section 719.01 of the Revised Code, the municipal corporation may, when reasonably necessary, acquire property outside the limits of the municipal corporation.

If real property so acquired is removed from the tax duplicate, the municipal corporation shall pay annually to the county treasurer of the county in which such property is located, commencing with the tax year after the removal of such property from the tax duplicate, an amount of money in lieu of taxes equal to the smaller of the following:

(A) The last annual installment of taxes due from the acquired property before removal from the tax duplicate;

(B) An amount equal to the difference between the combined revenue from real estate taxes of all the taxing districts in which such property is located in the tax year immediately prior to the removal of such acquired property from the tax duplicate, and (1) the total revenue which would be produced by the tax rate of each such taxing district in the tax year immediately prior to the removal of such acquired property from the tax duplicate, applied to the real estate tax duplicate of each of such taxing districts in each tax year subsequent to the year of removal, or (2) the combined revenue from real estate taxes of all such taxing districts in each tax year subsequent to the year of removal, whichever is the greater.

The county auditor of each county in which such property is located shall apportion each such annual payments to each taxing district as if such annual payment had been levied and collected as a tax.

Such annual payments shall never again be made after they have ceased.

APPENDIX E

Ohio Revised Code, Title 7:

§ 743.01 General powers of legislative authority. (GC § 3955)

The legislative authority of a municipal corporation may take possession of any land obtained for the construction or extension of water works, reservoirs, or the laying down of pipe, and also any water rights or easements connected with the use of water. Any land, water right, or easement so taken possession of for water-works purposes shall not be used for any other purpose, except by authority of the director of public service and with consent of such legislative authority.